No. 10709

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARVIN S. NICHOLS,
Appellant,

vs.

J. J. NEWBERRY COMPANY, a corporation,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the Eastern District of Washington Northern Division.

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STATEMENT OF THE CASE

Appellant's statement is incomplete, especially as concerns events leading up to the acts complained of— a material omission in a case where appellee's good faith is a vital element. Consequently the following statement, of facts deemed indisputable, is submitted:

On April 17, 1941, on the complaint of one Hummer that appellant had cashed a forged check at his store, appellant was arrested on a charge of forgery and put in jail. While he was there another person pleaded guilty to the forgery, and after having been in jail 27 days appellant was released from custody; and subsequently the charge was dismissed. (R. 31.)

Appellee had no connection with these occurrences, and knew nothing of them.

About this time the police department of the City of Spokane delivered to the Retail Trade Bureau, a branch of the Chamber of Commerce composed of the leading merchants of the city, two sets of photographs, evidently in numerous counterparts, with police numbers thereon, designated respectively as "check artists," which included a picture of appellant, and "shoplifters." The Retail Trade Bureau distributed the pictures to leading merchants.

including appellee's manager, at a bureau luncheon. (R. 25, 37.) This was done without any request of appellee. (R. 27, 38.)

Many times other groups of photographs had been brought direct from the police department and left with appellee. (R. 27.)

In this instance appellee's manager posted the pictures on a piece of cardboard, which was framed and put in the bulletin board in the restroom for girl employees. The pictures were kept there from the early part of 1941 until September, 1942. Appellant's picture was placed under the title "Check Artists," according to pencil notations made by the police department on the backs of the pictures. (R. 26.)

The girl employees were instructed to be on the lookout for those parties and if they saw anybody do anything to report it. The salesgirls and wrappers had no authority to cash checks but would refer them to the cashier. (R. 24, 26.)

Appellee usually employed about sixty girls, and between 140 and 180 at Christmas time. The turnover was rapid.

The restroom was on the second floor. The door leading to it was marked "Employees Only," and

was closed but not locked. It led first to a hall about 15 feet long and 4 feet wide, which opened into the restroom. (R. 24.)

The restroom was a large room with tables, chairs and a couch, and contained a lavatory. Each girl had a locker. They visited the restroom on arriving in the morning, at lunch time, during the afternoon rest period, and on leaving in the evening. A matron was usually there.

No one was allowed in the room but the girl employees, janitors and repairmen. (R. 26.)

The bulletin board containing the picture was placed upon a cage where the matron was located. (R. 19.) The pictures were placed in the bulletin board and locked. (R. 23.)

Notwithstanding the implication at the middle of page 3 of appellant's brief, there was no evidence that any customer ever used the restroom. Another restroom for customers was maintained. If any one happened to go into the employees' room by mistake, he was told to get out, that the room was intended for employees only. (R. 19.)

When it came to the attention of appellee's manager that there was some claim about one of the pictures, he took them all down. (R. 27.)

SUMMARY OF ARGUMENT

1. The posting of appellant's picture in employees' restroom was privileged.

2. The publisher of a privileged communication is not liable for unauthorized repetition by persons to whom, in the exercise of the privilege, the information has been confided.

3. Testimony of witness Hummer, identifying appellant, was properly admitted, truth of the publication being an issue, and appellant himself having testified to the same effect.

4. Testimony of Secretary of Retail Trade Bureau, that he had received pictures from the Police Department and distributed them to merchants, was relevant as bearing upon appellee's good faith.

ARGUMENT

I.

Privilege

Appellant takes the position that, in Washington, no privilege exists if the defamatory matter is untrue. (Brief of Appellant, 11.)

In support, appellant cites a group of cases at page 12. A glance at the names of the defendants

exposes the fallacy of the argument. The defendants are all newspapers or magazines, except Funk, who was the publisher of a newspaper, the news columns of which were in question, and Louis Wasmer, Inc., which was the proprietor of a broadcasting station. One who publishes to the whole world can claim no privilege except the right to comment on the facts as a matter of public interest.

The privilege involved in the instant case, on the other hand, is the qualified privilege of one who, for the protection of his own interest, makes a communication to others having a corresponding interest or duty, the only question being whether he abused the privilege by acting in bad faith, or by communicating information not reasonably necessary to the operation of the business, or by communicating it to persons whose knowledge about it was not reasonably required—a question decided by the jury in appellee's favor on a correct instruction. (R. 38-g.) Where such privilege exists, conditioned as above, the communication, though it be false, is not actionable.

33 Am. Jur., Libel and Slander, Secs. 126, 171;

Restatement of the Law, Torts, Sec. 593 *et seq.*, and scope note preceding Sec. 593.

The distinction, upon this point, between publications by newspaper or radio and private communications or matters of mutual concern is admirably stated by the trial court in *Holden v. American News Co.,* (Dist. Ct., E. Dist. Wash., N. D. 1943), 52 F. Supp. 24, the material portion of which is printed in the record, pp. 51-59.

Appellant speaks (Brief, 14) as though the trial court found the Washington decisions irreconcilable. On the contrary, the court found them distinctly reconcilable. If they were not, and appellant's view should prevail, the law of Washington on the subject would indeed be an anomaly.

The qualified or conditional privilege attendant upon private communications was recognized in Washington as early as *Kimble v. Kimble,* 14 Wash. 369, where a letter from a son to his mother, even though containing matter which was libelous, was held privileged, unless the plaintiff could show malice.

The general principle, thus followed, was later applied in the following cases:

> *Chambers v. Leiser,* 43 Wash. 285, 86 Wash. 627, (letter from one stockholder to another);

Fahey v. Shafer, 98 Wash. 517, 167 Pac. 1118 (communications by street-level clothiers to general manager and advertising manager of a newspaper and the Retail Clothiers' Association, at a luncheon, and to the president of the Ad Club and the chairman of its "vigilance committee," concerning an upstairs clothing firm);

Ecuyer v. New York Life Insurance Co., 101 Wash. 247, 172 Pac. 359 (communication to parent touching minor son's conduct, and communication to one to whom had applied for employment).

Prins v. Holland-North America Co., 107 Wash. 206, 181 Pac. 680. (letter written in Dutch language from main office of corporation in Holland to branch office in Seattle, where it was read by co-manager and bookkeeper).

Compare *Lathrop v. Sundberg,* 55 Wash. 144, 104 Pac. 176 (privilege clearly exceeded by publishing communication in newspapers);

Stevens v. Haering's Grocetorium, 125 Wash. 404, 216 Pac. 870 (statement made to police officers in a loud and unduly harsh manner, over a telephone located in a public market, and within the hearing of many, held not privileged).

Thus, the Washington court has shown no inclination to ignore the universally accepted rule that communications made in good faith on a subject in which the person communicating has an interest or duty to a person having a corresponding interest or duty, such as communications between employer and employee, are privileged; but, on the contrary, has repeatedly recognized and applied it.

Somewhat similar to our case upon the question whether the privilege was exceeded are:

Ramsdell v. Pennsylvania Railroad Company, (1910) 79 N. J. L. 379, 75 A. 444, where notice of the discharge of a dining car conductor was posted in the office of the dining car department, and it was held error to have excluded evidence that other persons besides dining car conductors had been seen in the room, and *Sheftall v. Central of Georgia Ry. Co.* (1905) 123 Ga. 589, 51 S. E. 646. In the latter case a conductor who had been

discharged kept some unused railway and sleeping-car tickets. The company posted notices with plaintiff's name and the ticket numbers, implying that plaintiff would endeavor to pass the tickets. The notices were posted in places where classes of employees who did not handle tickets, and members of the public, could see them. The court held that the occasion was privileged, but that plaintiff was entitled to a clear and specific instruction concerning the intent and manner of publication.

In the present case, all the evidence offered as to who saw the picture was received, and the question whether the privilege had been in any way exceeded was put before the jury by proper instructions.

It is concluded that a distinction between newspaper publications or radio broadcasts to the wide world, and restricted private communications in certain well-defined or logically definable circumstances, exists in Washington as elsewhere; that communications between an employer and his employees constitute one of such well-defined situations and so are conditionally privileged; and that in this instance the question whether the publication was in good faith and whether the privilege had been exceeded was properly submitted to the jury.

II.

Repetition by Employees to Persons Outside Store

Appellant asked Jean Pearce, one of the salesgirls, concerning the photograph, "Did you tell anyone after you saw it?" The court excluded the testimony upon the ground that it was not a natural and logical consequence. (R. 15, 17.)

This was right, the publication being privileged.

McBride v. Ledoux, (1904) 119 La. 398, 35 S. 615;

Vacicek v. Trojack, (Ct. Civ. App. Tex. 1920) 226 S. W. 505;

Rigney v. W. R. Kessee Co., (1927) 104 W. Va. 168, 139 S. E. 650, 54 A. L. R. 1139.

The reasoning is stated in the case last cited, 54 A. L. R., p. 1143:

> "In case of a privileged communication, such as the one here, the primary object of its author is to protect and advance his business interest, and not to affect the reputation of the one maligned. It is for that reason that he is relieved at law from any imputation of malice. Consequently, if we regard the author as having no animus toward and no desire to injure the one libeled, it follows on principle that he

> should not be called to answer for a republication unless it appears that a republication was contemplated or intended by him."

The fact that some of the employees may have told persons outside the store would not tend to prove that such a consequence should have been anticipated as natural and probable.

Moveover, the testimony got in anyway. Helen Coffee, who worked at the store one day, testified that Jean Pearce had previously told her (R. 22); Frances Mohney testified that she had told her father and may have told others (R. 21); Ella C. Mott had ascertained the fact (R. 34); appellant and his wife had learned of it (R. 31, 36); and appellant knew that it had come to the attention of his friends and neighbors (R. 34). Notwithstanding all this testimony, the jury's verdict was for appellee, after an instruction by the court that the privilege depended, among other conditions, upon the appellee's having made every reasonably careful effort that no one except those who had the duty or interest with respect to the defamatory matter had access to it. (R. 38-g.)

Thus, the exclusions were correct; and, in any event, were harmless.

III.

Hummer's Testimony

Error is assigned on admission of the testimony of E. J. Hummer, identifying appellant as the person who had cashed checks at his store and as the person against whom he had made the complaint. (R. 36.)

The truth of the publication was an issue, and while it was not pursued, and appellant did not cross-examine Hummer, the testimony was certainly relevant and material.

Futhermore, appellant himself had already testified on direct examination to exactly the same effect (R. 31, 32) so that the evidence was invited; and in any event it was a duplication, and, so, harmless.

IV.

Source of Information

Error is also assigned on the admission of the testimony of Richard Dunning, secretary of the Retail Trade Bureau, to the effect that the photograph of appellant had been received from the Police Department and in turn delivered by him to appellee and other merchants.

It is a condition of the privilege that the pub-

lisher believe the communication which he publishes to be true, and have reasonable grounds for so believing.

> 33 Am. Jur., Libel and Slander, Sec. 126, p. 126;
>
> Restatement of the Law, Torts, Secs. 600, 601.

The sources of his information and the circumstances under which he receives it are clearly of primary importance in determining the honesty and reasonableness of his belief.

> See *Fahey v. Shafer,* 98 Wash. 517, 522, 524, 167 Pac. 1118, 1120, 1121.

Dunning's testimony, therefore, was of the greatest materiality and was properly received.

CONCLUSION

This case illustrates the subject of conditional privilege in the law of libel. It is found that the decisions in Washington are in accord with universally stated rules. The court's instructions followed the law exactly, and no error occurred in the rulings on evidence.

The judgment on the verdict of the jury should be affirmed.

Respectfully submitted,

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